FACULTY OF
LAW AND CRIMINOLOGY

Instituut
FINANCIEEL RECHT
FINANCIAL LAW
Institute

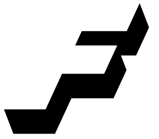
INFLUENCER MARKETING MEETS CONSUMER PROTECTION: THE ROLE OF THE RULES ON UNFAIR COMMERCIAL PRACTICES IN REGULATING SOCIAL MEDIA INFLUENCERS

WP 2024-01

Julie Kerckaert

Financial Law Institute
Working Paper Series

UNIVERSITEIT
GENT



WP 2024-01

Julie Kerckaert

Influencer Marketing Meets Consumer Protection: The Role of the Rules on Unfair Commercial Practices in Regulating Social Media Influencers

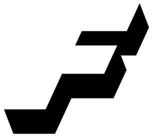
The author welcomes your comments at julie.kerckaert@ugent.be.

This working paper is a draft of a chapter that will appear in J. KERCKAERT and S. Geiregat (eds.), *Social Media Influencers and the #Law*, Heverlee, LeA Uitgevers, 2024.

The entire working paper series can be consulted at www.fli.ugent.be.

© Financial Law Institute, Ghent University, 2024

GHENT UNIVERSITY



Introduction

1. Social media influencers[1] have become key players in the advertising industry[2]. The use of influencers for advertising purposes is, however, not without risks for the consumer. Influencers are, by definition, not only the disseminators, but also the creators of the marketing content. Consequently, commercial content created by influencers blends in seamlessly with other user-generated content[3]. On top of that, influencers often fail to (adequately) disclose the commercial nature of their posts[4]. Because of this lack of transparency, social media users—especially when they are minors[5]—may think that a particular post reflects the influencer's unbiased opinion of a product, when in reality the influencer is being paid to endorse said product[6].

The dangers associated with influencer marketing are not limited to the disclosure issue[7]. For example, social media influencers may promote illegal products, such as counterfeit goods[8].

---

[1] The guidance on the interpretation and application of the UCPD describes an influencer as "a natural person or virtual entity who has a greater than average reach in a relevant platform". See European Commission, *Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market*, 17 December 2021, 97. Regarding virtual influencers, see J. GOETGHEBUER and F. MERTENS, "Virtual Reality, Real Responsibility: The Regulatory Landscape for Virtual Influencers" in J. KERCKAERT and S. GEIREGAT, *Social Media Influencers and the #Law*, Heverlee, LeA Uitgevers, forthcoming.

[2] A recent study provided by the Policy Department for Economic, Scientific and Quality of Life Policies at the request of the Committee on the Internal Market and Consumer Protection shows that the influencer industry has grown significantly in recent years, becoming one of the most popular and effective forms of online advertising. See F. MICHAELSEN et al., *The impact of influencers on advertising and consumer protection in the Single Market*, February 2022, www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf.

[3] See F. MICHAELSEN et al., *The impact of influencers on advertising and consumer protection in the Single Market*, 55-56.

[4] A study by the European Commission reveals a major concern about influencers' failure to properly disclose commercial content. See European Commission, *Behavioural Study on Advertising and Marketing Practices in Online Social Media*, June 2018, https://ec.europa.eu/info/publications/behavioural-study-advertising-and-marketing-practices-social-media-0_en.

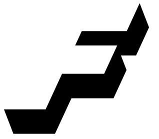
[5] Given the limited advertising literacy of children (i.e., their knowledge of advertising and their ability to critically reflect on advertising), they are a highly vulnerable target group when it comes to persuasion. See M. DE VEIRMAN, L. HUDDERS and M.R. NELSON, "What is influencer marketing and how does it target children? A review and direction for future research", *Front. Psychol.* (*Frontiers in Psychology*) 2019, vol. 10, 1–16.

[6] See F. MICHAELSEN et al., *The impact of influencers on advertising and consumer protection in the Single Market*, 53-55.

[7] See F. MICHAELSEN et al., *The impact of influencers on advertising and consumer protection in the Single Market*, 57-60.

[8] Two years ago, in the context of a government campaign led by former State Secretary for Consumer Protection Eva De Bleeker, five Belgian influencers posted fake promotional messages on their Instagram profiles for, *inter alia*, counterfeit handbags, ivory-based face cream and sustainable cigarettes. See A. TORBEYNS, "Bedenkelijke reclame door influencers is stunt", *De Standaard* 16 March 2021, www.standaard.be/cnt/dmf20210315_98117183. Last year, on the occasion of the World Consumer Rights Day on 15 March, the Federal Public Service Economy, SMEs, Middle Classes and Energy (*Federale Overheidsdienst Economie, KMO, Middenstand en Energie*) also appealed to eight

© Financial Law Institute, Ghent University, 2024



According to a survey conducted by the European Consumer Organisation (BEUC), nearly half of the consumers who come across influencers saw them promoting possible scams or potentially dangerous products[9]. One could also think of influencers directly exhorting their underage followers to purchase the advertised products or to persuade their parents to do so for them. For instance, in 2018, a Belgian YouTuber encouraged his mainly underage subscribers to steal their parents' credit cards in order to purchase his merchandise[10].

2. The question arises as to what degree the rules on unfair commercial practices can protect consumers against problematic influencer-created commercial content. The Unfair Commercial Practices Directive (UCPD)[11], which has fully harmonised the national rules on unfair business-to-consumer commercial practices[12], will only apply if the influencer qualifies as a "trader" within the meaning of Article 2(b) of the UCPD and his marketing activities as "commercial practices" within the meaning of Article 2(d) of the UCPD. In Belgium, the rules on unfair commercial practices are incorporated in Book VI ("Market Practices and Consumer Protection") of the Code of Economic Law (CEL)[13]. Book VI of the CEL also contains, *inter alia*, the provisions of the Unfair Contract Terms Directive (UCTD)[14] and the provisions of the Consumer Rights Directive (CRD)[15]. The scope of Book VI of the CEL is delineated by the concept of "undertaking" as defined in Article I.8, 39° of the CEL. This concept of undertaking must be interpreted in accordance with European consumer law. The UCPD's definition of commercial practices is copied and pasted in Article I.8, 23° of the CEL.

3. The first part of this chapter will examine the extent to which social media influencers are subject to the rules on unfair commercial practices, as implemented in Book VI of the CEL, when they promote third-party traders' products to their followers. The second part of this

---

influencers to raise awareness among young people about the dangers of counterfeit products. See https://news.economie.fgov.be/211184-vergeet-het-het-is-fake.

[9] See BEUC, *Connected, but unfairly treated: Consumer survey results on the fairness of the online environment*, 5. In addition, the survey shows that 42 percent of the consumers exposed to influencer content have seen influencers promoting crypto products. With regard to finfluencers, see N. ROGGE and S. VANDEN EYNDE, "The Legal Implications of Disclaimers Used by Finfluencers" in J. KERCKAERT and S. GEIREGAT, *Social Media Influencers and the #Law*, Leuven, LeA Uitgevers, forthcoming.

[10] See D. DECKMYN, "Steel de creditcard van je ouders!", *De Standaard* 21 September 2018, www.standaard.be/cnt/dmf20180920_03770634.

[11] Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *O.J. L.* 149/22.

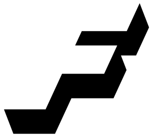
[12] See Recitals 14–15 UCPD.

[13] Code of Economic Law (*Wetboek van Economisch Recht*) 28 February 2013, *Belgian Official Gazette* 29 March 2013.

[14] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *O.J. L.* 95/29.

[15] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *O.J. L.* 304/64.

© Financial Law Institute, Ghent University, 2024



chapter will analyse how the rules on unfair commercial practices, in so far as they apply, may deal with the disclosure issue, which remains one of the main concerns related to influencers.

I. Scope of application

A. Personal scope of application

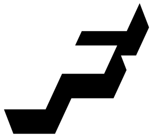
4. The applicability of Book VI of the CEL depends on the social media influencer's classification as an undertaking within the meaning of Article I.8, 39° of the CEL. Article I.8, 39° of the CEL defines an undertaking as "any natural person or legal entity pursuing an economic purpose in a sustainable manner, including its associations". When considering the rules on unfair commercial practices, the concept of undertaking must be interpreted in line with the case law of the Court of Justice of the European Union (CJEU) on the scope of the UCPD. Indeed, according to the CJEU's settled case law, the need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which does not expressly refer to the law of the member states for the purpose of determining its meaning and scope, must normally be given an autonomous and uniform interpretation throughout the EU. That interpretation must take into account the context of the provision and the purpose of the legislation in question[16].

5. Under Article 2(b) of the UCPD a trader is considered "any natural or legal person who, in commercial practices covered [by the UCPD], is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader". In contrast to Article 2(b) of the UCPD, Article I.8, 39° of the CEL refers to any natural or legal person "pursuing an economic purpose". Moreover, intermediaries are not explicitly mentioned. Nevertheless, in the context of the rules on unfair commercial practices, Article I.8, 39° of the CEL must be interpreted as covering both the natural or legal person who is acting for professional purposes[17] and anyone acting in the name of or on behalf of a trader[18].

---

[16] See, *inter alia*, CJEU 3 October 2013, Case C-59/12, *BKK Mobil Oil*, ECLI:EU:C:2013:634, para 25.
[17] See R. STEENNOT, "Tot ziens handelaar, welkom onderneming: modernisering met belangrijke impact, doch geen vereenvoudiging", *TPR* (*Tijdschrift voor Privaatrecht*) 2018, issue 3, (881) 885 No. 5; R. STEENNOT, J. WERBROUCK and R. VAN DER BRUGGEN, "Het nieuwe ondernemingsbegrip in het economisch recht" in D. BRULOOT and H. DE WULF (eds.), *Het nieuwe ondernemingsrecht*, Mechelen, Wolters Kluwer, 2020, 27-28 No. 34; G. STRAETMANS, "Art. I.8, 13° WER" in R. STEENNOT, G. STRAETMANS, J. STUYCK and H. VANHEES (eds.), *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer, 2023, 22 No. 21.
[18] See R. STEENNOT and P. GEERTS, "De implementatie van de richtlijn oneerlijke handelspraktijken in België en Nederland", *TPR* (*Tijdschrift voor Privaatrecht*) 2011, issue 3, (677) 689; G. STRAETMANS, "Art. I.8, 39° WER" in R. STEENNOT, G. STRAETMANS, J. STUYCK and H. VANHEES (eds.), *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer, 2023, 42 No. 49.

© Financial Law Institute, Ghent University, 2024



6. The ruling of the CJEU in the *Kamenova* case serves as an adequate starting point for the analysis of the requirement of a professional activity. With respect to intermediaries, the *RLvS* case should be scrutinised.

1. *The requirement of a professional activity*

7. In the *Kamenova* case[19], the CJEU addresses the question of whether a natural person who simultaneously publishes a number of advertisements on a website offering new and second-hand goods for sale may be qualified as a trader within the meaning of Article 2(b) of the UCPD and Article 2(2) of the CRD and whether such activity constitutes a commercial practice under Article 2(d) of the UCPD.

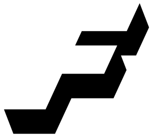
8. The CJEU starts by recalling that the concept of trader is defined almost identically in the UCPD and the CRD[20]. Furthermore, the CJEU explains that both directives are based on Article 114 of the Treaty on the Functioning of the European Union (TFEU)[21] and thus pursue the same objectives, namely to contribute to the proper functioning of the internal market and to ensure a high level of consumer protection[22]. Advocate General SZPUNAR additionally argues in his opinion that, to achieve those objectives, both directives bring about the same degree of harmonisation[23]. Therefore, the CJEU decides that the concept of trader, as defined in the UCPD and the CRD, must be interpreted uniformly[24].

9. The CJEU continues by pointing out that the European legislator adopted a particularly broad notion of the term trader, which refers to any natural or legal person who carries out a gainful activity, not excluding either bodies pursuing a task of public interest or those which are governed by public law[25]. The meaning and scope of the concept of trader must be determined in relation to the related but diametrically opposed concept of consumer, referring to any individual not engaged in commercial or trade activities[26]. In relation to a trader, consumers find themselves in a weaker position, which means they are deemed to be less informed, economically weaker and less experienced in legal matters[27]. It follows that the notion of trader is a functional concept[28]. The CJEU stresses that the classification as a trader requires a case-by-case approach[29]. Several criteria should be taken into account:

---

[19] CJEU 4 October 2018, Case C-105/17, *Kamenova*, ECLI:EU:C:2018:808.
[20] See Case C-105/17, *Kamenova*, para 27.
[21] Treaty on the Functioning of the European Union, *O.J. C.* 326/47.
[22] See Case C-105/17, *Kamenova*, para 28.
[23] See opinion of Advocate General SZPUNAR of 31 May 2018, Case C-105/17, *Kamenova*, ECLI:EU:C:2018:378, para 30, 33-39 and 46-47.
[24] See Case C-105/17, *Kamenova*, para 29.
[25] See Case C-105/17, *Kamenova*, para 30. See also Case C-59/12, *BKK Mobil Oil*, para 32.
[26] See Case C-105/17, *Kamenova*, para 33. See also Case C-59/12, *BKK Mobil Oil*, para 33.
[27] See Case C-105/17, *Kamenova*, para 34. See also Case C-59/12, *BKK Mobil Oil*, para 35.
[28] See Case C-105/17, *Kamenova*, para 35.
[29] See Case C-105/17, *Kamenova*, para 37.

© Financial Law Institute, Ghent University, 2024



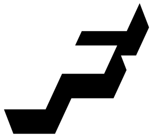
- whether the sale on the online platform was carried out in an organised manner;
- whether the sale was intended to generate profit;
- whether the seller had technical information and expertise relating to the products which she offered for sale which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer;
- whether the seller had a legal status which enabled her to engage in commercial activities and to what extent the online sale was connected to the seller's commercial or professional activity;
- whether the seller was subject to VAT;
- whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive[30];
- whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity;
- whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods[31].

The CJEU notes that the criteria it sets out in its judgement are neither exhaustive nor exclusive and that the mere fact that one or more of these criteria are met is not sufficient, in itself, to establish the classification as a trader[32]. It is for the national courts to make an overall assessment, on the basis of all the facts available to it, in order to decide whether a natural person may be regarded as a trader[33].

10. At first glance, the CJEU does not seem to establish a hierarchy in the criteria. According to STRAETMANS, however, certain criteria appear to hold more weight than others. In particular, some criteria only seem to provide further context for more general criteria. The two overarching criteria are the organised nature of the activity and the profit motive. The criteria that clarify the organised nature of the activity are the regularity and frequency of the activity, and the diversity and value of the goods for sale. The profit motive, on the other hand, may be indicated by the legal status of the seller and the remunerative nature of the activity. If clarity is not yet obtained based on these criteria, additional criteria come into play. These

[30] Advocate General SZPUNAR links this criterion to influencer marketing: "In some cases, a trader rewards an 'influencer' for purchases of the trader's products made via the 'influencer's' website". See opinion of Advocate General SZPUNAR, Case C-105/17, *Kamenova*, footnote 36.
[31] See Case C-105/17, *Kamenova*, para 38.
[32] See Case C-105/17, *Kamenova*, para 39-40.
[33] See Case C-105/17, *Kamenova*, para 45. See also opinion of Advocate General SZPUNAR, Case C-105/17, *Kamenova*, para 52-53.

© Financial Law Institute, Ghent University, 2024



include the technical expertise of the seller in relation to the consumer, the link between the sale and the commercial activity of the seller, and the obligation to pay VAT[34].

2. *Intermediaries*

11. As regards trader's agents, Advocate General SZPUNAR points out in his opinion in the *Kamenova* case that the second part of Article 2(b) of the UCPD refers to "anyone acting in the name of or on behalf of a trader", whereas article 2(2) of the CRD describes a trader as "any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, *including through any other person acting in his name or on his behalf*, for purposes relating to his trade, business, craft or profession in relation to contracts covered by [the CRD]". In contrast to the definition of trader in the UCPD, Article 2(2) of the CRD does not appear to cover persons who are operating in the name of or on behalf of a trader. Instead, Article 2(2) of the CRD only seems to imply that the fact that a person makes use of an intermediary does not relieve him of his status as a trader. The Advocate General stresses that it should be observed that the issue of the classification as an agent acting in the name of or on behalf of a trader does not arise in the context of the CRD since the directive applies to contracts which, in principle, have already been concluded between the trader and the consumer. However, the Advocate General seems to overlook that the CRD does impose obligations on traders prior to the conclusion of a contract which are of relevance to intermediaries. In particular, all traders are required, before the consumer is bound by a distance or off-premises contract, or any corresponding offer, to inform the consumer, where applicable, of the identity and geographical address of the trader on whose behalf he is acting and, if necessary, the address of that trader's place of business[35].

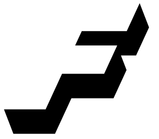
In its recent ruling in the *Tiketa* case[36], the CJEU establishes that Article 2(2) of the CRD is to be interpreted as meaning that a natural or legal person who is acting as an intermediary in the name of or on behalf of another trader must himself be considered a trader bound by the obligations set out in the CRD, irrespective of whether or not he has informed the consumer that he was acting in that capacity. The CJEU further emphasises that the fact that that intermediary is a trader does not prevent the principal trader, in whose name or on whose behalf that intermediary is acting, from also being regarded as a trader, without there being

[34] See G. STRAETMANS, "Het ondernemingsbegrip. Aanknopingsfactor van economisch recht (deel 1)", *NjW* 2020, issue 419, (234) 286 No. 99; G. STRAETMANS, "Art. I.8, 39° WER" in R. STEENNOT, G. STRAETMANS, J. STUYCK and H. VANHEES (eds.), *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer, 2021, 26 No. 49.

[35] See Art. 6(1)(c) and 6(1)(d) CRD. See also European Commission, *Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights*, 29 December 2021, 27.

[36] CJEU 24 February 2022, Case C-536/20, *Tiketa*, ECLI:EU:C:2022:112.

© Financial Law Institute, Ghent University, 2024



any need to establish the existence of a twofold provision of services. Both of those traders are required to ensure compliance with the requirements laid down by the CRD[37].

In view of the uniform interpretation advocated by the CJEU, the concept of trader, as defined in the UCPD and the CRD, must be construed as including both traders acting on their own behalf, traders acting through another person acting on their behalf and anyone acting on behalf of a trader[38]. Of course, it still needs to be determined what it means to act in the name of or on behalf of a trader.

12. In the *RLvS* case[39], the CJEU attends to the question whether the UCPD precludes the application of a national provision, intending not only to protect consumers against misleading practices but also to protect the independence of the press, under which publishers are required to include a specific identification, *in casu* by the use of the term advertisement, in their periodicals for which they receive remuneration, unless it is already evident from the arrangement and layout of the publication that it is an advertisement.

13. In short, the facts of the case are the following: RLvS, an advertising magazine publisher established in Stuttgart, published two articles for which it had received compensation from sponsors. Stuttgarter Wochenblatt, a publisher of a weekly newspaper and a competitor of RLvS, considered that the two publications violated Paragraph 10 of the Landespressegesetz Baden-Württemberg—the national provision at issue—as they were not clearly identifiable as advertisements. At first instance, the Regional Court of Stuttgart upheld the action brought before it by Stuttgarter Wochenblatt and ordered RLvS not to publish or cause to be published for remuneration any publication not identified by the term advertisement (*Anzeige*) in its advertiser. The Higher Regional Court of Stuttgart dismissed RLvS's appeal against that judgment. In its appeal on a point of law before the referring court, the Federal Court of Justice, RLvS maintained its form of order seeking dismissal of Stuttgarter Wochenblatt's application, arguing that Paragraph 10 of the Landespressegesetz Baden-Württemberg infringed EU law and was therefore not applicable[40].

14. To answer the question referred for a preliminary ruling, the CJEU assesses, taking into account the complete harmonisation effected by the UCPD and the fact that the national provision in question pursues the protection of both consumers' and competitors' interests, whether the conduct covered by the national provision, namely the publication of editorial content by a newspaper publisher, does in fact come within the field approximated by the

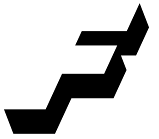
[37] See Case C-536/20, *Tiketa*, para 31 and 34-36. See also CJEU 31 March 2022, Case C-96/21, *CTS Eventim*, ECLI:EU:C:2022:238, para 23. Finally, see G. STRAETMANS, "Art. I.8, 39° WER", 2023, 42-43 No. 49.

[38] The CJEU appears to confirm this in the *Kamenova* case as it states that it is clear from the wording of Article of the 2(b) UCPD and Article 2(2) of the CRD that, in order to qualify as a trader, the person concerned must be acting for purposes relating to his trade, business, craft or profession *or* in the name of or on behalf of a trader. See Case C-105/17, *Kamenova*, para 32.

[39] CJEU 17 October 2013, Case C-391/12, *RLvS*, ECLI:EU:C:2013:669.

[40] See Case C-391/12, *RLvS*, para 14-26.

© Financial Law Institute, Ghent University, 2024



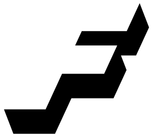
directive (i.e., constitutes a commercial practice within the meaning of Article 2(d) of the UCPD). As to the UCPD's personal scope, the CJEU underlines that, given the second part of its description of a trader, the directive can also apply in a situation where an operator's commercial practices are put to use by another undertaking acting in the name of or on behalf of that operator, with the result that the provisions of the directive could in certain situations be invoked against both the operator and the undertaking *if* they both satisfy the definition of trader[41]. It appears, however, that the CJEU insists on a restrictive interpretation of the words "acting in the name of or on behalf of a trader". According to the CJEU, it is common ground that, in circumstances such as those at issue in the *RLvS* case, a newspaper publisher, which inserts two paid-for articles in its free advertiser, does *not* act in the name of or on behalf of the sponsors in question[42].

15. The CJEU's interpretation of the words "acting in the name of or on behalf of a trader" in the *RLvS* case seems too restrictive[43]. The justification of the European Parliament for the extended definition of trader does not corroborate this strict delimitation on the UCPD's scope: "The directive must cover the promotion of actions by other firms, since more and more often unfair practices are being employed by third parties which have contractual links to a trader. By the same token, interaction between a variety of firms (advertising, distribution, mail order) often makes it impossible to identify precisely which one is responsible for the breach of the rules[44]." As can be read, the European Parliament's explanatory statement only demands a contractual link with a trader. Such contractual link is clearly present in the case where a trader commissions a newspaper publisher to publish editorial content to promote its products. The guidance on the interpretation and application of the UCPD leaves no room for doubt in this respect: A company that places advertisements in the media on behalf of and in the interests of another company, which is the service provider, must be considered a trader within the meaning of the UCPD[45].

16. Remarkably, according to the guidance on the interpretation and application of the UCPD, the concept of trader also covers *consumers* acting in the name of or on behalf of another trader[46]. It must, however, be reminded that the European Commission's guidance—although it may shed some light on the wording of the directive—is in no way binding in terms of the interpretation of the UCPD. The authoritative interpretation of EU law remains within the sole

[41] See Case C-391/12, *RLvS*, para 38. See also opinion of Advocate General SZPUNAR of 24 June 2021, Case C-371/20, *Peek and Cloppenburg*, ECLI:EU:C:2021:520, para 24.
[42] See Case C-391/12, *RLvS*, para 40.
[43] See to that effect W. VAN BOOM, *TvC* (*Tijdschrift voor Consumentenrecht & handelspraktijken)* 2014, 141-150.
[44] See European Parliament, *Report on the proposal for a European Parliament and Council directive concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive)*, 18 March 2004, 13.
[45] See European Commission, *Guidance on the interpretation and application of the UCPD*, 26.
[46] See European Commission, *Guidance on the interpretation and application of the UCPD*, 32.

© Financial Law Institute, Ghent University, 2024



remit of the CJEU[47]. In my opinion, a person acting in the name of or on behalf of a trader will not be subject to the UCPD if he does not himself fulfil the requirement of a professional activity[48]. The concept of trader is diametrically opposed to the concept of consumer. The objective of the UCPD is to protect the consumer against the economically stronger and more legally experienced party. Of course, this does not in any way imply that the initiating trader who is carrying out a commercial practice through a non-professional entity would himself lose his status as a trader. Accordingly, the extension of the definition of trader is only germane to the issue of whom, as in which professional entities, the commercial practices can be attributed to. Nevertheless, it must be explicitly noted that the UCPD does not deal with the apportionment of liability, which remains a national matter[49].

3. *The influencer marketing context*

17. To fall within the personal scope of Book VI of the CEL, specifically the rules on unfair commercial practices contained therein, social media influencers must, in accordance with Article 2(b) of the UCPD, act for purposes relating to their trade, business, craft or profession[50]. In assessing the professional nature of the influencer's marketing activities, all circumstances of the individual case, in particular the organised nature of the activities and the profit motive, have to be considered. While some influencers frequently collaborate with brands, others only occasionally engage in a commercial deal. Furthermore, there are numerous ways in which

---

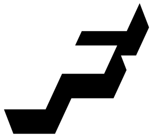
[47] In his opinion in the *Slewo* case, Advocate General SAUGMANDSGAARD ØE notes that the guidance document on the application of the CRD cites mattresses as examples of goods which might not be returnable due to health protection or hygiene reasons. Advocate General SAUGMANDSGAARD ØE, however, emphasises that the guidance document is not legally binding and as such does not constitute a formal interpretation of EU law (see opinion of Advocate General SAUGMANDSGAARD ØE of 19 December 2019, Case C-681/17, *Slewo*, ECLI:EU:C:2018:1041, para 37 and footnote 31). The CJEU eventually decided—opposing the guidance—that matrasses are not excluded from the right of withdrawal if they have been unsealed after delivery (see CJEU 27 March 2019, Case C-681/17, *Slewo*, ECLI:EU:C:2019:255, para 41-48). The preamble to the European Commission's guidance on the interpretation and application of the UCPD also expressly states: "This Notice is intended purely as a guidance document — only the text of the Union legislation itself has legal force. Any authoritative reading of the law has to be derived from the text of the Directive and directly from the decisions of the Court."

[48] See R. STEENNOT and P. GEERTS, "De implementatie van de richtlijn oneerlijke handelspraktijken in België en Nederland", 689 No. 13: "Tussenpersonen die optreden in naam van en /of voor rekening van een andere handelaar *in het kader van een beroepsactiviteit*, zijn eveneens handelaar." (own ephasis added) See also G. STRAETMANS, "Art. I.8, 39° WER", 2023, 42 No. 49: "Tussenpersonen, natuurlijke personen en a fortiori rechtspersonen, *die zelfstandig en op duurzame wijze een economische activiteit uitoefenen*, zijn ondernemingen." (own emphasis added)

[49] See B. KEIRSBILCK, *The New European Law of Unfair Commercial Practices and Competition Law*, Oxford, Hart Publishing, 2011, 240.

[50] According to the European Commission's guidance on the application of the UCPD, non-professional influencers can be subject to the directive: "In contrast, the UCPD does not apply to consumers who provide information about their experience with products or services, unless they can be considered as acting 'in the name of or on behalf of a trader' (see further section 4.2.6 on influencer marketing)". See European Commission, *Guidance on the interpretation and application of the UCPD*, 94. This viewpoint is, however, not endorsed in this chapter.

© Financial Law Institute, Ghent University, 2024



influencers can be compensated for their advertising services. For instance, influencers may receive a fixed or variable[51] amount of money, free products, or a discount code to purchase the company's goods. Consequently, in some cases it will be obvious that the influencer holds the status of trader within the meaning of the UCPD, whereas other cases will not be as black-and-white[52]. However, by analogy with the context of the collaborative economy, it is not feasible to set EU-wide quantitative thresholds, such as the level or percentage of income drawn from the influencer activities, to distinguish between professional and non-professional influencers, in particular because of the differences in the level of incomes across the EU member states[53]. The introduction of quantitative criteria seems equally problematic at national level[54].

To achieve legal certainty, member states may choose to broaden the scope of the rules on unfair commercial practices to encompass all influencers, without prejudice to the maximum harmonisation of the UCPD. To this end, a bill regulating influencers was submitted to the Belgian Chamber of Representatives on 15 September 2023[55]. This bill mirrors the French law of 9 June 2023 aimed at regulating commercial influence and combating abuses by influencers on social networks[56]. The bill aims to bring all influencers within the scope of the rules on unfair commercial practices (Article VI.93 *et seq.* of the CEL). An influencer is defined as a natural or legal person who carries out an influencer marketing activity, and an influencer marketing activity as an activity which involves one or more natural or legal persons using their name to offer, for remuneration, online content to the public that directly or indirectly promotes a good or service. Nonetheless, with a view to ensuring the proper functioning of the internal market, a European approach appears preferable to national initiatives.

18. The importance of determining whether the influencer is acting in the name of or on behalf of a trader is twofold. Firstly, as indicated above, when a (professional or non-professional) influencer is acting as an intermediary, the initiating trader will always be responsible for guaranteeing compliance with the UCPD. Secondly, it will become clear in the next section of this chapter that whether the (professional) influencer is or is not acting in the name of or on behalf of a trader determines whether a certain commercial practice carried out

---

[51] In the case of affiliate marketing, the monetary compensation depends on the number of sales made through an affiliated link or using a discount code shared by the influencer. See F. MICHAELSEN et al., *The impact of influencers*, 38.

[52] See C. RIEFA and C. CLAUSEN, "Towards fairness in digital influencers' marketing practices", *EuCML (Journal of European Consumer and Market Law)* 2019, issue 2, 66.

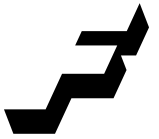
[53] See European Commission, *Report of the Fitness Check*, SWD (2017) 209 final, 109.

[54] See J. KERCKAERT, "De minderjarige socialemedia-influencer als onderneming", *DCCR* 2023, issue 2, 53-54 No. 31.

[55] See bill to regulate influencer marketing (*wetsvoorstel ter regulering van influencermarketing*) of 15 September 2023, *Parliamentary Documents* (*Parlementaire Stukken*) Chamber 2022-23, No. 55- 3567/1.

[56] See Act No. 2023-451 aimed at regulating commercial influence and combating abuses by influencers on social networks (*LOI n° 2023-451 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux*) of 9 June 2023, www.legifrance.gouv.fr/jorf/id/JORFTEXT000047663185.

© Financial Law Institute, Ghent University, 2024



by the influencer in the interest of that trader can be attributed to the influencer for the application of the UCPD and thus whether the influencer will be subject to the obligations imposed by the directive with regard to that specific commercial practice. On the basis of the current case law, it is practically impossible to establish criteria for determining whether the influencer is acting in the name of or on behalf of a trader. Several variables could potentially play a role. To start with, the nature of the agreement between the influencer and the company can differ: some influencers have to follow detailed instructions regarding the required content, while others enjoy complete creative freedom. Moreover, the duration of the collaboration could be a factor: in some cases, influencers only enter into an occasional contractual arrangement with a trader, while in other cases, influencers are involved in long-term partnerships as so-called brand ambassadors. Finally, the type of incentive received by the influencer to promote the company's products could also be taken into account.

According to STRAETMANS, the necessary relationship between the influencer and the initiating trader will be established as soon as the influencer receives payment from that trader. In line with the CJEU's ruling in the *Peek and Cloppenburg* case, the concept of payment should be interpreted broadly (see *infra*). Whether the advertiser has editorial control over the message shared by the influencer is irrelevant[57]. This perspective seems to align with the recommendations for influencers published by the Federal Public Service Economy, SMEs, Middle Classes, and Energy (FPS Economy)[58]. These recommendations clarify in which cases and how influencers must indicate the commercial nature of their content, as such constituting the FPS Economy's interpretation of the rules on unfair commercial practices. The guidelines show that, according to the FPS Economy, the rules on unfair commercial practices will apply whenever (i) the influencer verbally, visually or textually highlights a product or brand and (ii) the influencer receives a benefit from the company behind the advertised product or brand. In other words, it is not required that there is an agreement between the influencer and the company, that the company explicitly asks the influencer to publish a post or that the company has editorial control. Surprisingly, the FPS Economy does not take into account the concept of undertaking as defined in Article I.8, 39° of the CEL. Nevertheless, it remains to be seen whether the FPS Economy will actually impose sanctions on non-professional influencers[59].

The European Commission's guidance on the interpretation and application of the UCPD also insists on a broad application of the directive: "The commercial element is considered to be present whenever the influencer receives any form of consideration for the endorsement, including in case of payment, discounts, partnership arrangements, percentage from affiliate links, free products (including unsolicited gifts), trips or event invitations etc. The presence of

---

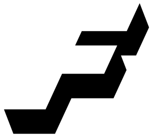
[57] See G. STRAETMANS, "Art. I.8, 13° WER", 22-27 No. 22-25.

[58] The FPS Economy is a federal public service of Belgium, which is responsible for the preparation, implementation and evaluation of economic policy (see https://economie.fgov.be/en/about-fps-economy). As a federal public service, the FPS Economy may impose administrative fines on influencers violating the law.

[59] See J. KERCKAERT, "FOD Economie publiceert nieuwe aanbevelingen voor influencers", *TBH* 3 mei 2022, www.rdc-tbh.be/nl/news/fod-economie-publiceert-nieuwe-aanbevelingen-voor-influencers.

© Financial Law Institute, Ghent University, 2024

GHENT UNIVERSITY



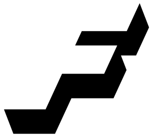
a contract and monetary payment is not necessary to trigger the application of these rules. […] Depending on the circumstances of the case, the breach could be attributed both to the influencer or to the trader/brand that has engaged the influencer and benefits from the endorsement. The presence of editorial control by the trader is not necessary to trigger the application of these rules but could serve as a factor in the determination of its liability. […] Subject to the assessment of the circumstances of the case, such liability is unlikely to be present in the scenario where an influencer does not have any connections to the trader/brand (i.e. misleadingly pretends to act on behalf of the trader)[60]." To create legal certainty, the BEUC recommends introducing a rebuttable presumption that influencers are in a commercial relationship with traders[61].

B. Material scope of application

19. When the social media influencer concerned qualifies as a trader within the meaning of Article 2(b) of the UCPD, the subsequent step is to determine whether their activities constitute commercial practices under Article 2(d) of the UCPD. The UCPD is characterised by a particularly wide scope *ratione materiae*[62]. Article 2(d) of the UCPD defines commercial practices as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers" [63]. An identical definition can be found in Article I.8, 23° of the CEL. Article 3(1) of the UCPD, which is implemented in Article VI.92 of the CEL, supplements this definition by specifying that the UCPD applies to unfair commercial practices before, during and after a commercial transaction in relation to a product. The recitals to the UCPD also provide further clarification: "In order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution[64]." Undisputedly, commercial communications, including advertising and marketing, which take place prior to or outside the conclusion of a contract, may form commercial practices within the meaning of

[60] See European Commission, *Guidance on the interpretation and application of the UCPD*, 98. See also BEUC, *From influence to responsibility: Time to regulate influencer marketing*, 18 July 2023, 1 and 8-9.
[61] See BEUC, *From influence to responsibility: Time to regulate influencer marketing*, 2 and 13.
[62] See CJEU 23 April 2009, Joined Cases C-261 and 299/07, *VTB-VAB and Galatea*, ECLI:EU:C:2009:244, para 49; CJEU 14 January 2010, Case C-304/08, *Plus Warenhandelsgesellschaft*, ECLI:EU:C:2010:12, para 36; CJEU 9 November 2010, Case C-540/08, *Mediaprint*, ECLI:EU:2010:660, para 17 and 21; CJEU 30 June 2011, Case C-288/10, *Wamo*, ECLI:EU:C:2011:443, para 30; Case C-391/12, *RLvS*, para 37; CJEU 19 September 2013, Case C-435/11, *CHS Tour Services*, ECLI:EU:C:2013:574, para 27; Case C-59/12, *BKK Mobil Oil*, para 40; CJEU 20 July 2017, Case C-357/16, *Gelvora*, ECLI:EU:C:2017:573, para 19; Case C-105/17, *Kamenova*, para 41.
[63] Art. 2(c) UCPD defines product as "any goods or service including immovable property, rights and obligations".
[64] See Recital 13 UCPD. See also Case C-357/16, *Gelvora*, para 20; CJEU 4 July 2019, Case C-393/17, *Kirschstein*, ECLI:EU:C:2019:563, para 40.

© Financial Law Institute, Ghent University, 2024



the UCPD. This will, however, only be the case if the commercial communication is "directly connected with the promotion, sale or supply of a product to consumers". For the purpose of identifying the meaning of this notion of a direct connection, the next section revisits the judgement of the CJEU in the *RLvS* case and introduces the *Peek and Cloppenburg* case.

1. *The presence of a direct connection with the promotion, sale or supply of a product to consumers*

20. The CJEU has repeatedly emphasised in its case law—and has, to my knowledge, only once altered its stance in this regard (see *infra*)—that an activity can only be regarded as a practice that is commercial in nature if it originates from a trader, forms part of its commercial strategy and is directly connected with the promotion, sale or supply of *its* products to consumers[65]. The *RLvS* case allowed the CJEU to reiterate, in the context of the publication of editorial content by the publisher of a free advertiser (see *supra*), that the practices covered by Article 2(d) of the UCPD must originate from traders and must be directly connected with the promotion, sale or supply of *their* products to consumers[66]. *In casu*, the CJEU holds that, even though they are liable to be classified as commercial practices, the two publications in question did not promote the publisher's product (i.e., a free newspaper) but rather the products of the undertakings that paid for the articles[67]. If a direct connection could be established with respect to the commercial communications, that connection would exist with the goods and services of those undertakings and not with the publisher's product[68]. The articles, the CJEU proceeds, were not such as to significantly alter the economic behaviour of the consumer in his decision to purchase or—more appropriate—take possession of the free newspaper[69]. In addition, the CJEU finds that the publisher did not act in the name of or on behalf of the sponsors (see *supra*)[70]. All of the foregoing arguments lead the CJEU to the conclusion that, in circumstances such as those at issue in the *RLvS* case, the publishing practices of a newspaper publisher in themselves cannot be classified as commercial practices and thus do not come within the UCPD's scope *ratione materiae*. To be more specific, the CJEU decides that the UCPD does not apply to the publication of editorial content on the part of the publisher of a free advertiser where it is established that the publication is not directly connected with the promotion of the

---

[65] See Cases C-261/07 and C-299/07, *VTB-VAB* and *Galatea*, para 50; Case C-304/08, *Plus Warenhandelsgesellschaft*, para 37; Case C-540/08, *Mediaprint*, para 18; Case C-288/10, *Wamo*, para 31; Case C-393/17, *Kirschstein*, para 41 and 43; CJEU 2 September 2021, Case C-371/20, *Peek and Cloppenburg*, ECLI:EU:C2021:674, para 31.

[66] See Case C-391/12, *RLvS*, para 36-37. See also B. KEIRSBILCK, "Oneerlijke handels- en beroepspraktijken jegens consumenten (2008-2014)", *TPR* (*Tijdschrift voor Privaatrecht*) 2016, 255-257 nr. 5; B. KEIRSBILCK, "Art. VI.92 WER" in R. STEENNOT, G. STRAETMANS, J. STUYCK and H. VANHEES (eds.), *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer, 2018, 5; J. STUYCK and B. KEIRSBILCK, *Handels- en economisch recht. Deel 2 Mededingingsrecht. A. Handelspraktijken en contracten met consumenten*, Mechelen, Wolters Kluwer, 2019, 359-360 No. 352.

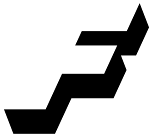
[67] See Case C-391/12, *RLvS*, para 39-40.

[68] See Case C-391/12, *RLvS*, para 40.

[69] See Case C-391/12, *RLvS*, para 41.

[70] See Case C-391/12, *RLvS*, para 40.

© Financial Law Institute, Ghent University, 2024



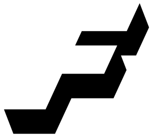
advertiser and the publisher does not act in the name of or on behalf of the trader that paid for the editorial content[71]. *A contrario*, it can be concluded—presuming that the two foregoing premises are not to be regarded as concurrent conditions—that that publisher will be subject to the UCPD when that publisher is either acting in the name of or on behalf of the other trader, provided that there exists a direct link to the promotion of the other trader's products, or the publication of the editorial content is directly connected with the promotion of the newspaper.

21. The CJEU seeks further support for this perspective in Point 11 of Annex I to the UCPD. Under Point 11 of Annex I using editorial content in the media to promote a product is in all circumstances considered unfair where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer[72]. According to the CJEU, Point 11 does not impose an obligation on newspaper publishers to prevent possible unfair commercial practices by advertisers for which a direct connection could thereby be potentially established with the promotion, sale or supply to consumers of the products of those advertisers[73]. Finally, the CJEU contends that a broader application of the UCPD would be in conflict with the European legislation existing in the field of audiovisual media[74]. The CJEU explains that the responsibility for publishers enclosed in the national provision in question corresponds in essence to the obligations EU law imposes on the suppliers of audiovisual media services[75]. The CJEU concludes that since the EU legislator has not yet adopted this kind of secondary legislation for the written press, the member states retain the power to obligate newspaper publishers to indicate when editorial content has been sponsored[76].

22. The reasoning the CJEU puts forth in the *RLvS* case is questionable. Moreover, the CJEU's ruling also leaves several questions unanswered. To begin with, the CJEU does not adopt a stand on the issue of whether the two paid-for articles concerned directly promoted the products of the initiating sponsors[77]. The first of the two publications was financed by an energy company offering a wide range of services, including the sale of bio heating oil. The article consisted of a short introduction, a report accompanied by photographs on prominent guests who attended the final game of the season played by a German football team and an indication that the item was sponsored by a third party. The second article, comprising an editorial snapshot of a German city and a similar sponsorship disclosure, was paid for by a German low-cost airline[78]. The guidance on the application of the UCPD points out that where a trader, for example, sells a street map, not containing any promotional messages whatsoever,

[71] See Case C-391/12, *RLvS*, para 49.
[72] See Case C-391/12, *RLvS*, para 43.
[73] See Case C-391/12, *RLvS*, para 44.
[74] See Case C-391/12, *RLvS*, para 45.
[75] See Case C-391/12, *RLvS*, para 48.
[76] See Case C-391/12, *RLvS*, para 49.
[77] See Case C-391/12, *RLvS*, para 40-41.
[78] See Case C-391/12, *RLvS*, para 22-23.

© Financial Law Institute, Ghent University, 2024



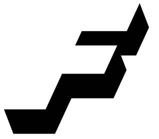
and the consumer subsequently uses that street map to find his way to a shop, the selling of that street map cannot be qualified as a commercial practice directly connected with the promotion of a product in that given shop[79]. On the other side of the spectrum, it is clear-cut that where a trader provides information relating to the availability of a product at an attractive price during a certain period, a direct link to the promotion of that product can be established[80]. The analysis is, however, not as straightforward in the case of certain other promotion strategies, such as branding (e.g., displaying a company's logo on the jerseys of a professional football team), image advertising (e.g., highlighting a company's environmental awareness in an interview with the press) or, for that matter, native advertising (e.g., promoting a company's products via sponsored editorial content on a news website).

In Belgian case law and legal doctrine, the requirement of a direct connection is interpreted very broadly. Article I.8, 13° of the CEL defines advertising as "any communication aimed directly or indirectly at promoting the sale of products, irrespective of the place or means of communication used". Pursuant to this definition, it is sufficient for a communication to have an *indirect* connection with the sales promotion of a product to be considered advertising. The Court of Cassation specified in 1999 that "any communication that favours or enhances the image of the author is indirectly aimed at promoting the sale of his products"[81]. In 2011, the Court of Cassation reiterated that communications that favour or strengthen the consumer's confidence in the seller and thus indirectly aim to promote the sale of the seller's products fall under the concept of advertising[82]. Moreover, communications emanating from an undertaking are presumed to have a sales promotion purpose[83]. This rebuttable presumption also applies in the situation where an undertaking is acting in the name of or on behalf of another undertaking[84]. Since the concept of commercial practices encompasses advertising, the requirement of a direct connection with the promotion, sale or supply of a product to consumers cannot be interpreted differently from the requirement to be aimed directly or indirectly at promoting the sale of products[85].

---

[79] See European Commission, *Guidance on the interpretation and application of the UCPD*, 35.
[80] See CJEU 19 December 2013, Case C-281/12, *Trento Sviluppo*, ECLI:EU:C:2013:859, para 35.
[81] See Court of Cassation (*Hof van Cassatie*) 12 November 1999, *Arr.Cass.* 1999, 1422. See also G. STRAETMANS, "Art. I.8, 13° WER", 16 No. 16; J. STUYCK and B. KEIRSBILCK, *Handels- en economisch recht. Deel 2 Mededingingsrecht. A. Handelspraktijken en contracten met consumenten*, 322 No. 317.
[82] See Court of Cassation 18 March 2011, *NJW* (*Nieuw Juridisch Weekblad*) 2011, issue 248, 579, with commentary from R. STEENNOT. See also G. STRAETMANS, "Art. I.8, 13° WER", 16 No. 16; J. STUYCK and B. KEIRSBILCK, *Handels- en economisch recht. Deel 2 Mededingingsrecht. A. Handelspraktijken en contracten met consumenten*, 322-323 No. 317.
[83] See G. STRAETMANS, "Art. I.8, 13° WER", 18-19 No. 17 and 20 No. 19; J. STUYCK and B. KEIRSBILCK, *Handels- en economisch recht. Deel 2 Mededingingsrecht. A. Handelspraktijken en contracten met consumenten*, 324 No. 320.
[84] See G. STRAETMANS, "Art. I.8, 13° WER", 22 No. 21.
[85] See G. STRAETMANS, "Art. I.8, 13° WER", 25-26 No. 24; G. STRAETMANS, "Art. I.8, 23° WER" in R. STEENNOT, G. STRAETMANS, J. STUYCK and H. VANHEES (eds.), *Handels- en economisch recht. Commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Wolters Kluwer, 2023, 10-11 No. 6.

© Financial Law Institute, Ghent University, 2024

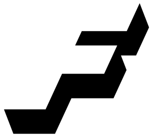


The Belgian definition of advertising originates from Directive 84/450/EEC concerning misleading advertising[86], which was repealed by Directive 2006/114/EC concerning misleading and comparative advertising[87]. Article 2(a) of Directive 2006/114/EC defines advertising as "the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations". In its ruling in the *Belgian Electronic Sorting Technology* case[88], the CJEU emphasises that that particularly broad definition of advertising means that the forms which advertising may take are very varied[89]. *In casu*, the CJEU decides that the concept of advertising even covers, in a situation such as that at issue in the main proceedings, the use of a domain name and that of metatags in a website's metadata[90].

23. Respecting the connection with the promotion of the publisher's product, the CJEU settles that the publication of editorial content by the publisher of a free newspaper, in circumstances such as those at issue in the *RLvS* case, is *not* directly connected with the promotion of that newspaper[91]. Nonetheless, according to the CJEU, a newspaper publisher may employ a commercial practice by offering consumers the chance of winning a prize in games, puzzles or competitions, thereby encouraging them to purchase its product[92]. It is incorrect to infer from the CJEU's assessment in the *RLvS* case that the publication of sponsored content by the publisher of a newspaper cannot under any circumstances—directly or indirectly—promote the publisher's product. In the *Peek and Cloppenburg* case, a company active in the retail sale launched a nationwide advertising campaign in a fashion magazine which invited readers to an evening of private sales under a title which referred to both the clothing retailer and the magazine[93]. The CJEU holds that the fact that the publication concerned a promotional event organised in cooperation with the fashion magazine acting as media operator and also intended to promote the magazine's sales, cannot call into question the nature of that action as a commercial practice attributable to the clothing business[94]. Advocate General SZPUNAR adds to this finding that the CJEU has already stated that the UCPD may apply in a situation where an operator's commercial practices are put to use by another undertaking, acting in the name of or on behalf of that operator, with the result that the provisions of the directive could in certain situations be relied on against both the operator and the undertaking *if* they satisfy the definition of trader. *A fortiori*, it cannot be ruled out that

[86] Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, *O.J. L.* 250/17.
[87] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, *O.J. L.* 376/21.
[88] CJEU 11 July 2013, Case C-657/11, *Belgian Electronic Sorting Technology*, ECLI:EU:C:2013:516.
[89] See Case C-657/11, *Belgian Electronic Sorting Technology*, para 35.
[90] See Case C-657/11, *Belgian Electronic Sorting Technology*, para 60.
[91] See Case C-391/12, *RLvS*, para 40.
[92] See Case C-391/12, *RLvS*, para 44. See also Case C-540/08, *Mediaprint*, para 18.
[93] See Case C-371/20, *Peek and Cloppenburg*, para 12.
[94] See Case C-371/20, *Peek and Cloppenburg*, para 32.

© Financial Law Institute, Ghent University, 2024



a single commercial practice can be attributed to two separate operators when they act on their own behalf and on behalf of a co-operant. Such commercial practice would also fall within the scope of the UCPD[95]. However, the Advocate General underlines that the question of whether the provisions of the UCPD can be relied on in respect of the fashion magazine (i.e., whether the publisher was acting in the name of or on behalf of the clothing company or whether the article is directly connected with the promotion of the magazine) does not arise in this case since the action in the main proceedings was directed solely against the clothing company. This notwithstanding, the Advocate General remarks in a footnote that the CJEU's judgement in the *RLvS* case may suggest that the publication of an article cannot constitute a commercial practice originating from a newspaper publisher. In that regard, the Advocate General straightens out that the articles in the *RLvS* case related to events external to a newspaper publisher, whereas the *Peek and Cloppenburg* case concerns the publication of an advertisement organised by a fashion magazine publisher in cooperation with another trader[96]. In this way, the Advocate General answers, albeit not expressly, the question of whether the publication of the article can be considered as a commercial practice emanating from the magazine publisher.

24. All this being said, the inscrutability of the CJEU goes much further: on what grounds does the CJEU maintain that a practice, to be commercial in nature, must originate from a trader and must be directly connected with the promotion, sale or supply of *its* product to consumers[97]? The wording of the UCPD does not indicate that a direct connection with the initiating trader's own products is necessary. In this context, it can be noted that the referring court in the *Peek and Cloppenburg* case drew attention to the concept of commercial practices as defined in German law[98]. According to the referring court, the definition of the concept adopted in German law is broader than that of the UCPD as it also includes acts by third parties aimed at promoting the sales or purchases of a third company not acting on behalf of or in the name of the trader[99]. However, Advocate General SZPUNAR stresses that the CJEU has not been asked to clarify whether German law correctly transposes Article 2(d) of the UCPD, nor is it necessary, in order to answer the questions referred for a preliminary ruling, to determine the extent to which the definition given in German law is broader than that laid down in EU law[100].

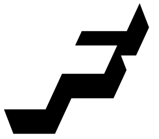
Even though the CJEU is rather persistent in its case law, it still chooses to deviate from its restrictive view in the context of debt collection. In the *Gelvora* judgment, the CJEU rules that debt recovery activities fall under the concept of commercial practices since the conditions in

---

[95] See opinion of Advocate General SZPUNAR, Case C-371/20, *Peek and Cloppenburg*, para 24.
[96] See opinion of Advocate General SZPUNAR, Case C-371/20, *Peek and Cloppenburg*, footnote 11.
[97] See B. KEIRSBILCK, "Oneerlijke handels- en beroepspraktijken jegens consumenten (2008-2014)", *TPR (Tijdschrift voor Privaatrecht)* 2016, 256; W. VAN BOOM, *TvC* 2014, 149.
[98] The Gesetz gegen den unlauteren Wettbewerb defines the concept as any conduct by a person for the benefit of his own or a third party's undertaking before, during or after the conclusion of a business transaction which is objectively linked to promoting the sale or supply of goods or services.
[99] See opinion of Advocate General SZPUNAR, Case C-371/20, *Peek and Cloppenburg*, para 26.
[100] See opinion of Advocate General SZPUNAR, Case C-371/20, *Peek and Cloppenburg*, para 27.

© Financial Law Institute, Ghent University, 2024

GHENT UNIVERSITY



which a debt owed by a consumer are recovered may be so important as to decisively influence the consumer's decision to take out a loan (i.e., the product of a third party and not of the debt collection agency)[101]. The CJEU continues that the exclusion of credit repayment transactions in the event of the assignment of a debt could call into question the effectiveness of the protection afforded to consumers by the UCPD since professionals could be tempted to separate the recovery phase in order not to be subject to the protective provisions of the directive[102]. Although the CJEU jumps through unnecessary hoops to bring debt collection activities under the UCPD's scope *ratione materiae*, the CJEU's argument regarding consumer protection does make sense and can be extended to encompass certain influencer marketing cases (see *infra*). After all, the UCPD's primary objective is still to achieve a high level of consumer protection[103].

25. This leaves only the CJEU's final attempts to justify its delimitation on the scope of the UCPD. Firstly, there is the argument that Point 11 of Annex I to the UCPD does not intend to target the media operator but rather the advertiser that paid for the editorial content. Strangely enough, this brings the CJEU to the conclusion that the publication of editorial content does not constitute a commercial practice originating from the publisher of a newspaper. Surely, the fact that the practice of one trader appears on the list of commercial practices which are in all circumstances regarded as unfair does not preclude another trader from simultaneously committing an unfair commercial practice of his own, for example, under the general prohibition of misleading commercial practices[104]. Secondly, according to the CJEU, the existence of the obligations imposed on suppliers of audiovisual media services entails that the UCPD may not be relied on against the written press. This reasoning of the CJEU seems to be drawn out of thin air. The UCPD applies in so far as there are no other EU law provisions regulating specific aspects of unfair commercial practices[105]. Even practices occurring in audiovisual media services, such as misleading and aggressive practices, are subject to the UCPD to the extent that they are not covered by the rules on audiovisual media services. Only in the case of conflict between the provisions of the UCPD and other EU rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects[106].

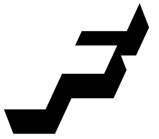
2. *The influencer marketing context*

26. To determine whether the influencer's marketing activities, which may take place prior to or outside the conclusion of a contract, fall within the UCPD's material scope, a distinction must be made between influencers endorsing their own products and influencers promoting

---

[101] See Case C-357/16, *Gelvora*, para 27.
[102] See Case C-357/16, *Gelvora*, para 28.
[103] See Art. 1 UCPD. See also Recital 1, 20 and 24 UCPD.
[104] See to that effect W. VAN BOOM, *TvC* 2014, 149.
[105] See Recital 10 UCPD.
[106] See Art. 3(4) UCPD.

© Financial Law Institute, Ghent University, 2024



the products of another trader. The latter category must be subdivided into influencers acting in the name of or on behalf of the other trader and influencers not acting in the name of or on behalf of the other trader.

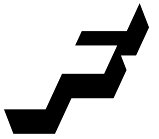
27. Commercial messages related to the influencer's own products[107] are subject to the UCPD if the influencer holds the status of trader (see *supra*), the messages form part of the influencer's commercial strategy and are directly connected with the promotion, sale or supply of the influencer's products to consumers. As is apparent from the CJEU's case law, the rules on unfair commercial practices can be relied on, for instance, when the influencer provides his followers with a discount code to purchase his products[108] or organises a giveaway (i.e., an online competition to win his products)[109]. In line with Belgian case law and legal doctrine, such direct connection can also be established in less obvious scenarios (e.g., when the influencer can be seen wearing his own merchandise in a photograph or video).

28. When the influencer shares marketing content regarding the products of another trader and acts in the name of or on behalf of that other trader, the content must be directly connected with the promotion of that other trader's products in order for the UCPD to apply. As in the case of the influencer promoting his own products, such a direct connection is present if, for example, the content provides information concerning a discount offer or a giveaway. By analogy with the CJEU's findings in the *Peek and Cloppenburg* case, the UCPD also applies to the publication of an article in which the influencer invites his followers to an evening of private sales organised by the third-party trader[110]. Sponsored content and content containing product placement are also considered to be advertising in Belgium[111] and therefore fall under the umbrella term "commercial practice".

29. When drawing a parallel with the *RLvS* case, the situation where the influencer communicates about the products of another trader but is not acting in the name of or on behalf of that trader requires a direct connection with the promotion of the influencer's own products for the UCPD to impose obligations on the influencer. Further, it can be assumed that the publication of sponsored editorial content by the influencer, acting as media operator, is not directly connected with the promotion of the medium through which the content is distributed (e.g., the influencer's blog, Instagram profile or YouTube channel)[112]. A direct connection with the promotion of the influencer's product could be present, for example, when the influencer

[107] For example, in 2021, the Dutch Nikkie De Jager, best known to her 13 million subscribers on YouTube as NikkieTutorials, launched her own cosmetics brand, Nimya by NikkieTutorials, which she promotes in many of her videos (see www.youtube.com/watch?v=EVRIgx7Qv6c).
[108] See Case C-281/12, *Trento Sviluppo*, para 35.
[109] See Case C-391/12, *RLvS*, para 44. See also Case C-540/08, *Mediaprint*, para 18.
[110] See Case C-371/20, *Peek and Cloppenburg*, para 32.
[111] See G. STRAETMANS, "Art. I.8, 13° WER", 9 No. 7.
[112] See Case C-391/12, *RLvS*, para 39-40. Nonetheless, when the words "acting in the name of or on behalf of a trader" are interpreted broadly, requiring only the presence of a payment, the influencer would be considered to act in the name of or on behalf of the sponsors of the editorial content.

© Financial Law Institute, Ghent University, 2024



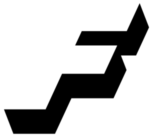
organises a giveaway regarding the products of another trader, requiring people who want to participate to follow or subscribe to the influencer's social media profile.

C. Interim conclusion

30. The extensive analysis of the scope of the rules on unfair commercial practices shows the difficulty in determining in which situations influencers are subject to these rules. To begin with, it became clear that it is impossible to set a precise threshold for when influencers meet the requirement of a professional activity. As a result, influencers may not be aware of the fact that they have become traders within the meaning of the UCPD. In addition, criteria to establish whether an influencer is acting in the name of or on behalf of another trader are currently lacking. In Belgium, the requirement of a direct connection with the promotion, sale or supply of a product is less of a problem, due to the very broad interpretation thereof. For instance, a direct connection will be present not only when the influencer expressly recommends the products of another trader in one of his videos, but also when those products are simply featured in the background. Nonetheless, for those promotional activities to be attributable to the influencer and, by extension, the main trader, it is necessary that the former acts in the name or on behalf of the latter.

31. In a number of typical cases, the interpretation of the words "acting in the name of or on behalf of" will determine whether or not influencers will be subject to the obligations imposed by the rules on unfair commercial practices and whether those rules can be invoked against the undertaking whose products are being promoted. As an illustration, there is the influencer who receives unsolicited free products from another trader. The influencer is not instructed to post (specific) content regarding the products in question. However, the influencer wishes to encourage the company to send more products in the future and decides to mention the products favourably on his social media profile. In doing so, the influencer may violate the rules on unfair commercial practices by, for example, sharing misleading information or directly exhorting children to buy the products. If the words "acting in the name of or on behalf of" are interpreted narrowly and the CJEU's reasoning in the *RLvS* case is followed, the consumer will not be able to rely on the UCPD against the influencer, even when he is acting for professional purposes, since he is promoting the products of another trader but is not acting in the name of or on behalf of that trader. The third-party trader is not subject to the directive either since it did not initiate the commercial practice nor is operating through another person acting on his behalf. In this way, brands may be provided with advertising services by influencers while at the same time escaping their responsibilities under the UCPD. This situation in which the consumer is completely deprived of the protection afforded by the rules on unfair commercial practices does not seem reconcilable with the objective of the UCPD, namely to ensure a high level of consumer protection.

© Financial Law Institute, Ghent University, 2024



32. According to STRAETMANS, however, the required relationship between the influencer, who does not offer the promoted products himself, and the supplier of the products will be present as soon as the influencer receives any form of compensation from the supplier. Only when there is absolutely no connection between the influencer and the undertaking whose products are promoted, the rules on unfair commercial practices will not apply. This perspective seems to align with the European Commission's guidance on the interpretation and application of the UCPD and the recommendations for influencers published by the FPS Economy.

33. The current legal uncertainty about the extent to which social media influencers are subject to the rules on unfair commercial practices has prompted France to adopt legislation extending the scope of the rules on unfair commercial practices to include all influencers. A bill replicating this French legislation was recently submitted to the Belgian Chamber of Representatives. The adoption of specific national legislation, however, leads to a fragmented consumer law framework for influencers within the EU. Given the intrinsic cross-border nature of influencer marketing and the digital world in general, this seems detrimental to the functioning of the internal market. Action is therefore needed at the European level.

II. Tackling the disclosure issue

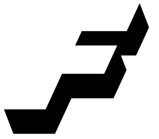
A. The three-layer structure of the prohibition on unfair commercial practices

34. Pursuant to Article VI.95 of the CEL, unfair commercial practices are prohibited. To start with, commercial practices are particularly unfair when they are considered misleading or aggressive[113]. Article VI.100 and VI.103 of the CEL enclose an exhaustive list of misleading and aggressive commercial practices, *respectively*, which are in all circumstances regarded as unfair (i.e., the so-called blacklists). Commercial practices which are not included in the blacklists, may also fall under the general prohibition of misleading (Articles VI.97-VI.99 of the CEL) and aggressive commercial practices (Articles VI.101-VI.102 of the CEL). Finally, commercial practices which do not appear on the blacklists and are not considered misleading or aggressive under the special general clauses, may still be captured by the comprehensive general clause of Article VI.93 of the CEL.

35. The next section of this chapter examines to what degree the prohibition on unfair commercial practices may deal with influencers not or insufficiently disclosing the commercial nature of their content.

[113] See Art. VI.94 CEL.

© Financial Law Institute, Ghent University, 2024



B. The blacklist of misleading commercial practices

36. The failure of influencers to (adequately) disclose the commercial nature of their content may potentially be considered an unfair commercial practice under Article VI.100, 11° of the CEL. Article VI.100, 11° of the CEL, which implements Point 11 of Annex I to the UCPD, prohibits the use of editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (see *supra*).

In the *Peek and Cloppenburg* judgement, the CJEU stresses that Point 11 of Annex I to the UCPD should be interpreted in a manner that reflects the reality of journalistic and advertising practice[114]. It also highlights the relevance of covert advertising on the internet through the dissemination of comments on social networks, forums or blogs, which appear to come from consumers themselves, whereas in fact they are commercial messages, directly or indirectly created or paid for by economic operators. Specifically, the case concerned the interpretation of the concept of payment within the meaning of Point 11. The CJEU decided that a trader pays for the promotion of a product by the publication of editorial content within the meaning of the UCPD where that trader provides consideration with an asset value for that publication, whether in the form of payment of a sum of money or in any other form, provided that there is a definite link between the payment by that trader and that publication[115]. Thus, the mere fact that the influencer is not compensated through a monetary payment is not sufficient, by itself, to prevent the application of Point 11[116]. The only thing of importance to the CJEU is that the trader grants the media operator some kind of advantage having an asset value which is liable to influence the content of that publication[117].

Nevertheless, the CJEU clarified in the *RLvS* case that the prohibition of so-called advertorials is not aimed as such to oblige newspaper publishers to prevent possible unfair commercial practices by advertisers[118]. It cannot be ruled out that this exemption of newspaper publishers also applies to influencers posting editorial content[119]. Practically, if the marketing activities of

---

[114] See Case C-371/20, *Peek and Cloppenburg*, para 42.

[115] Payment was found to be present in the case where the trader makes available, free of charge, images protected by copyright on which are visible the commercial premises and products which it offers for sale. See Case C-371/20, *Peek and Cloppenburg*, para 49.

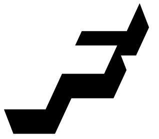
[116] See to that effect J. LUZAK and C. GOANTA, "#Paidpartnership Means More than Money: Influencer Disclosure Obligations in the Aftermath of Peek & Cloppenburg", *EuCML* 2022, 189.

[117] See Case C-371/20, *Peek and Cloppenburg*, para 44.

[118] See Case C-391/12, *RLvS*, para 44. In the *Peek and Cloppenburg* judgement, the CJEU seems to confirm this stand: "In the context of the first sentence of Point 11 of Annex I to that directive, that protection is given concrete expression in the field of the press and other media, in that that point requires *advertising undertakings* to indicate clearly that they have paid for editorial content in the media where that content is intended to promote a product or service originating from those traders". See Case C-371/20, *Peek and Cloppenburg*, para 40.

[119] See J. TRZASKOWSKI, "Identifying the Commercial Nature of 'Influencer Marketing' on the Internet" in P. WAHLGREN (ed.), *50 Years of Law and IT: The Swedish Law and Informatics Research Institute 1968-2018*, Stockholm, Stockholm Institute for Scandinavian Law, 2018, 85.

© Financial Law Institute, Ghent University, 2024



influencers were to be excluded from the scope of Point 11, this provision could only be relied on against the third-party trader who initiated the commercial practice and not against the influencer acting as media operator. However, influencers will usually have more editorial control than the publisher of an advertiser, which could justify their subjection to Point 11[120].

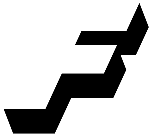
Moreover, there is no case law yet with regard to the other conditions of Point 11 of Annex I to the UCPD. It is questionable whether posts on the influencer's social media profile can actually be classified as editorial content[121]. According to the guidance on the interpretation and application of the UCPD, the concept of editorial content should be interpreted broadly, covering in some cases content generated by influencers or posted by them on social media platforms[122]. Nevertheless, its seems advisable to revise the wording of Point 11 to avoid any legal uncertainty. For instance, the European legislature could consider adding the notion "user-generated content"[123] or replacing the notion "editorial content" with the broader notion "content"[124]. It should also be made clear that Point 11 applies to social media (such as Instagram, YouTube and TikTok) in addition to media in the traditional sense[125]. Lastly, it is necessary to clarify the extent of disclosure required to make it clearly identifiable to the consumer that a trader has paid for the editorial content (see *infra* regarding misleading omissions)[126].

37. Influencers not (sufficiently) disclosing the commercial intent of their content could also be captured by Article VI.100, 22° of the CEL, which corresponds to Point 22 of Annex I to the UCPD. Under Point 22 it is in all circumstances considered unfair to falsely claim or create the impression that the trader is not acting for purposes relating to its trade, business, craft or profession, or to falsely represent oneself as a consumer. Where the influencer who is regarded a trader under the UCPD fails to disclose the commercial nature of a given post, it is clear that he violates the blacklist's prohibition on disguised trading. However, in situations where the commercial nature of the content is communicated, it is again uncertain in how far the used indicators, such as a link to the trader's website, always fulfil the disclosure requirement under Point 22 of Annex I (see *infra* regarding misleading omissions)[127]. Of course, the qualification as trader may in itself be problematic (see *supra*).

---

[120] See J. LUZAK and C. GOANTA, "#Paidpartnership Means More than Money: Influencer Disclosure Obligations in the Aftermath of Peek & Cloppenburg", *EuCML* 2022, 190.
[121] See J. LUZAK and C. GOANTA, "#Paidpartnership Means More than Money: Influencer Disclosure Obligations in the Aftermath of Peek & Cloppenburg", 190-191.
[122] See European Commission, *Guidance on the interpretation and application of the UCPD*, 98.
[123] See BEUC, *From influence to responsibility: Time to regulate influencer marketing*, 2 and 13-14.
[124] See J. LUZAK and C. GOANTA, "#Paidpartnership Means More than Money: Influencer Disclosure Obligations in the Aftermath of Peek & Cloppenburg", 191.
[125] See BEUC, *From influence to responsibility: Time to regulate influencer marketing*, 13.
[126] See European Commission, *Behavioural Study on Advertising and Marketing Practices in Online Social Media*, 15. See also BEUC, *From influence to responsibility: Time to regulate influencer marketing*, 7-8.
[127] See European Commission, *Behavioural Study on Advertising and Marketing Practices in Online Social Media*, 14-15.

© Financial Law Institute, Ghent University, 2024



C. The special general clause

1. *Misleading actions*

38. Under the special general clause of Article VI.97 of the CEL, implementing Article 6(1) of the UCPD, a commercial practice is considered as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to a number of essential elements, such as the existence or nature of the product, the main characteristics of the product, or *the nature, attributes and rights of the trader or its agent*. In addition, it must be demonstrated that the commercial practice causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise[128]. Article 2(k) of the UCPD, implemented in Article I.8, 28° of the CEL, defines transactional decision as "any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting". It is apparent from the wording of Article 2(k) of the UCPD that the concept of transactional decision is broadly defined. In the *Trento Sviluppo* case, the CJEU held that the concept therefore covers not only the decision whether or not to purchase a product, but also any decision directly related to that decision[129]. In that sense, the concept of transactional decision also includes pre-purchase decisions such as the decision to enter a shop or the decision to visit the trader's website[130]. This broad interpretation is also reflected in Belgian case law[131].

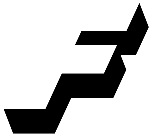
39. An influencer pretending to be an enthusiastic consumer, while he actually holds the status of trader, may be captured by Article VI.97 of the CEL. The influencer's content will, however, only amount to a misleading practice under Article 7 of the UCPD if it causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise, which is not the case for the blacklisted commercial practices. The UCPD uses as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case law of the CJEU, to determine the typical reaction of the average consumer in a given case[132]. Nevertheless, where a commercial practice specifically targets a vulnerable group of consumers (such as minors), the impact of the

---

[128] See European Commission, *Guidance on the interpretation and application of the UCPD*, 30-32.
[129] See Case C-281/12, *Trento Sviluppo*, para 36-38.
[130] See European Commission, *Guidance on the interpretation and application of the UCPD*, 31. See also G. STRAETMANS, "Art. I.8, 23° WER", 15 No. 10; J. STUYCK and B. KEIRSBILCK, *Handels- en economisch recht. Deel 2 Mededingingsrecht. A. Handelspraktijken en contracten met consumenten*, 371-372 No. 364.
[131] See G. STRAETMANS, "Art. I.8, 23° WER", 9-11 No. 6.
[132] Recital 18 UCPD.

© Financial Law Institute, Ghent University, 2024

GHENT UNIVERSITY



commercial practice should be assessed from the perspective of the average member of that group[133].

2. *Misleading omissions*

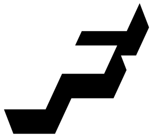
40. Under the specific general clause of Article VI.99 of the CEL, which implements Article 7 of the UCPD, a commercial practice is regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium[134], it omits material information[135] that the average consumer needs, according to the context, to take an informed transactional decision. A commercial practice is also regarded as a misleading omission when a trader hides or provides the aforementioned material information in an unclear, unintelligible, ambiguous or untimely manner or *fails to identify the commercial intent of the commercial practice if not already apparent from the context*. Again, these commercial practices are subject to the transactional decision test and thus must cause or must be likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

41. Clearly, Article VI.99 of the CEL offers another possibility to tackle hidden advertising. However, national authorities will need to assess on a case-by-case basis whether the commercial practice in question causes or is likely to cause the consumer to take a transactional decision that he would not have taken otherwise. Moreover, it is unclear how influencers can fulfil the transparency requirements under Article VI.99 of the CEL.

The FPS Economy clarifies in its recommendations that if the commercial nature of the message is not immediately clear from the context, the influencer will be subject to a labelling obligation. Generally, the advertising label must be so apparent that there can be no doubt about the marketing purpose of the influencer's post. The FPS Economy's recommendations demand that the label is visible at first glance. This means, for example, that the label cannot be placed at the end of the post. In addition, the label should be in the same language as the influencer's message. Preferably, influencers should use the tags #advertisement or #publicity. However, the tag #sponsored is allowed if no agreements were made on the

[133] Recital 18-19 UCPD. See also B. DUIVENVOORDE, 'The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive', *EuCML* 2013, pp 69-79.
[134] Article VI.99, third paragraph of the CEL, corresponding to 7(3) of the UCPD, clarifies that where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.
[135] The UCPD does not define the concept of material information, except for the specific case of an invitation to purchase. Article 2(i) of the UCPD, implemented in Article I.8, 26° of the CEL, defines an invitation to purchase as "a commercial communication which indicates [the] characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase".

© Financial Law Institute, Ghent University, 2024



specifics of the content[136]. In many cases, tags such as #ad, #adv, #collaboration and #partner will not be sufficient. Due to the ambiguous wording the FPS Economy chooses to use, the recommendations seem rather non-committal.

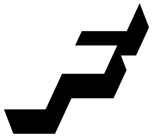
The aforementioned bill to regulate influencers, which was introduced to the Belgian Chamber of Representatives on 15 September 2023, aims to incorporate the FPS Economy's recommendations in the CEL[137]. A new provision would oblige influencers to explicitly indicate the commercial nature of their post by using the term "publicity" or "commercial collaboration". These terms should be clearly visible, legible and recognisable throughout the entire duration of the promotion, regardless of its format[138]. Remarkably, the authors of the bill seem to have forgotten that the UCPD's maximum harmonisation approach prohibits EU member states from providing additional consumer protection within the field approximated by the directive.

42. It is worth mentioning that, in addition to national authorities such as the FPS Economy, self-regulatory organisations also try to clarify what, in concrete terms, should be understood under the recognisability of advertising and how influencers can fulfil the imposed transparency requirements in practice. Of course, these soft law initiatives are not legally binding. At the European level, the European Advertising Standards Alliance (EASA)[139] adopted the Best Practice Recommendation on Influencer Marketing (BPRIM) in 2018[140]. The BPRIM was revised in 2023[141]. The EASA's BPRIM was developed to assist national self-regulatory organisations in creating their own codes. Nonetheless, the BPRIM leaves national self-regulatory organisations a lot of room for manoeuvre, thus adding little to the existing vaguely formulated legal provisions. In Belgium, the *Communicatie Centrum* and the *Jury voor Ethische Praktijken inzake reclame* (JEP)[142], the independent self-regulatory body of the Belgian advertising sector, published recommendations for influencers in October

---

[136] Influencers publishing content in Dutch should use the words *reclame*, *advertentie*, *publiciteit* or *gesponsord*.
[137] See bill to regulate influencer marketing, 5.
[138] See bill to regulate influencer marketing, 38.
[139] The EASA brings together a network of national self-regulatory organisations and organisations representing the advertising industry. The goal of the EASA is to set high operational standards for advertising self-regulation within the EU. For more information, see https://easa-alliance.org/about-easa.
[140] See EASA, *Best Practice Recommendation on Influencer Marketing*, December 2018.
[141] See EASA, *Best Practice Recommendation on Influencer Marketing*, May 2023, www.easa-alliance.org/wp-content/uploads/2023/05/EASA-BPR-on-Influencer-Marketing-2023-1.pdf.
[142] The Communicatie Centrum is the professional organisation that unites the different communication professions in Belgium. The Communicatie Centrum founded the JEP in 1974. This is an independent self-regulatory body whose mission is to ensure fair, sincere and socially responsible commercial communication.

© Financial Law Institute, Ghent University, 2024



2018[143]. These recommendations were revised in 2022[144]. As a self-regulatory organisation, the JEP may receive complaints and may, if necessary, take a decision to modify or terminate the advertising campaign, counting on the voluntary compliance by the advertiser. However, when comparing the JEP's recommendations with the initiatives of other national self-regulatory organisations, it becomes apparent that consistency is lacking. Given the intrinsic cross-border nature of influencer marketing, discrepancies between EU member states are not to be welcomed with open arms.

D. The comprehensive general clause

43. As a last resort, the comprehensive general clause could be invoked to take on non-transparent influencers. Article VI.93 of the CEL, implementing Article 5(2) of the UCPD, provides that a commercial practice is regarded as unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed or of the average member of the group when a commercial practice is directed to a particular group of consumers. According to Article 2(e) of the UCPD, implemented in Article I.8, 24° of the CEL, to materially distort the economic behaviour of consumers means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise. Thus, the requirement in relation to the material distortion of the consumer's economic behaviour is the same as that under the special general clauses[145]. The EC's guidance on the interpretation and the application of the UCPD clarifies that the notion of professional diligence encompasses principles such as honest market practice, good faith and good market practice. These principles emphasise normative values that apply in the specific field of business activity. It may include principles derived from codes of conduct[146].

E. Interim conclusion

44. In theory, the issue of hidden advertising by influencers can be tackled by appealing to the existing rules on unfair commercial practices. The blacklists offer the best prospects in this respect, as a causality with the distortion of the consumer's economic behaviour must not be demonstrated. Although the blacklist of misleading practices does not contain any tailored provisions, the prohibition of advertorials and the prohibition of disguised trading may

---

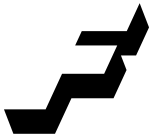
[143] Communicatie Centrum, *Aanbevelingen inzake online influencers*, October 2018, www.jep.be/sites/default/files/rule_reccommendation/aanbevelingen_van_de_raad_voor_de_reclame_online_influencers_nl.pdf.

[144] Communicatie Centrum, *Aanbevelingen inzake influencer marketing*, 2022, www.jep.be/wp-content/uploads/2022/04/influencers_NL.pdf.

[145] European Commission, *Guidance on the interpretation and the application of the UCPD*, 32.

[146] European Commission, *Guidance on the interpretation and the application of the UCPD*, 37.

© Financial Law Institute, Ghent University, 2024



potentially deal with influencers not (adequately) disclosing the commercial nature of their content. Nonetheless, there are doubts as to whether Point 11 can actually be applied in the context of influencer marketing, since the CJEU has not yet interpreted the concept of editorial content within the meaning of that provision. Moreover, the value of Point 11 seems limited given the boundaries inflicted upon it by the CJEU in the *RLvS* judgment. Item 22 faces its own obstacles, particularly the difficulties associated with the qualification of the influencer as trader. Furthermore, in both instances it is unclear how the influencer must provide disclosure to adhere to the transparency requirements. Similarly, this is the case when invoking the special general clause. On top of that, in order for the general prohibition of misleading actions and omissions to be relied on, it will have to be shown that the influencer's failure to disclose his commercial intent causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. Finally, the comprehensive general clause offers another possibility to deal with the disclosure issue. Here too, the likelihood of success hinges upon the outcome of the transactional decision test. The fact that it all comes down to an individual assessment by the national judge, in combination with a lack of relevant case law from the CJEU serving as guidance, leads to a high degree of legal uncertainty.

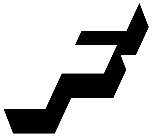
45. Over the years, both national authorities and self-regulatory organisations have attempted to convert the generally formulated rules on unfair commercial practices into more concrete recommendations for influencers. These recommendations are, however, not legally binding and vary per member state. In Belgium, a bill was introduced to embed the FPS Economy's recommendations in the CEL. This is somewhat surprising since the UCPD's maximum harmonisation approach does not allow member states to adopt stricter transparency requirements. It is clear that action is required at European level. One solution could be to update the blacklisted practices to better fit the digital context or even supplement them with new tailored provisions[147].

Conclusion

46. This contribution examined the extent to which the rules on unfair commercial practices can be applied in the context of influencer marketing. From a thorough analysis of the UCPD's scope, it appears that the application of these rules to influencers is not self-

[147] With respect to consumer reviews and endorsements, the so-called Omnibus Directive added a Point 23b to Annex I to the UCPD, which prohibits stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originate from such consumers. A new Point 23c prohibits submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products. See Recitals 47-49 and Art. 3(7)(b) Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, *O.J. L.* 328/7.

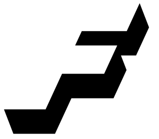
© Financial Law Institute, Ghent University, 2024

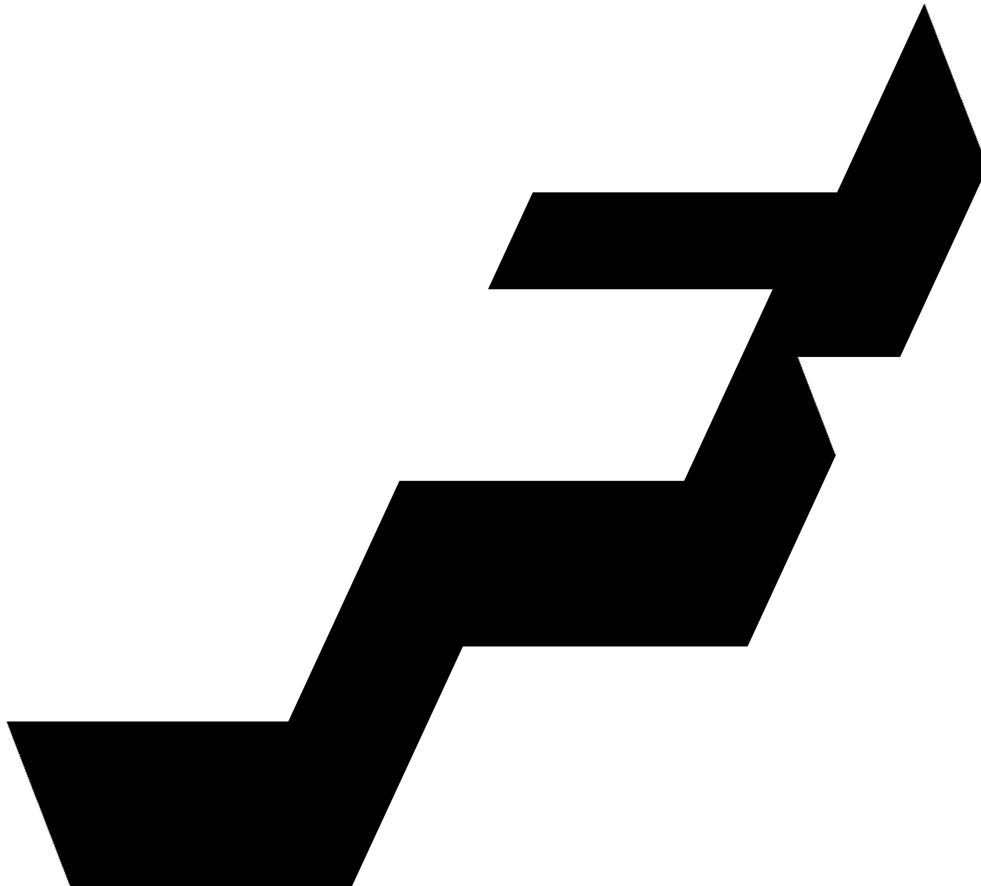


evident. In many cases, the qualification of the influencer as trader and the qualification of his marketing activities as commercial practices will be problematic. Consequently, all parties involved are confronted with legal uncertainty. In principle, the EU member states could broaden the scope of the unfair commercial practices regime and thus subject all influencers to it, without prejudice to the maximum harmonisation of the UCPD. However, with the internal market idea in mind, this seems anything but desirable.

47. On top of that, the rules on unfair commercial practices themselves create a lot of ambiguity. Despite the fact that these rules could theoretically deal with unfair influencer marketing practices, the general clauses are formulated very vaguely, which makes it challenging for influencers to know how to comply with them. An extension of the blacklist, which is the most interesting to appeal to, with more tailored provisions could address this issue.

© Financial Law Institute, Ghent University, 2024





The **Financial Law Institute** is a research and teaching unit in the Faculty of Law and Criminology of Ghent University, Belgium. The research activities undertaken within the Institute focus on various issues of company and financial law, including private and public law of banking, capital markets regulation, company law and corporate governance.

The **Working Paper Series**, launched in 1999, aims at promoting the dissemination of the research output of the Financial Law Institute's researchers to the broader academic community. The use and further distribution of the Working Papers is allowed for scientific purposes only. The working papers are provisional.

© Financial Law Institute, Ghent University, 2024